In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 412

FRED W. WOODWARD and ELSIE M. WOODWARD, F. R. WOODWARD and M. JEANNE WOODWARD, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

As of 1960, petitioners collectively owned a majority interest in the Telegraph Herald, an Iowa corporation. Because the charter of the corporation was due to expire in 1961, its stockholders met on June 9, 1960, and, by majority vote adopted a resolution extending the existence of the corporation perpetually. Shortly thereafter, a certificate for the renewal of the corporate charter was issued by the Secretary of State of Iowa.

One of the shareholders, who owned 379 of the 1,200 outstanding shares, voted against renewal of the charter. Under Iowa law, those stockholders voting for renewal were obligated to purchase the dissenter's shares at "real value". On February 9, 1962, all of the majority shareholders, except one, commenced an appraisal proceeding in the Iowa courts. After proceedings in the trial court and the Supreme Court of Iowa, the real value of the dissenter's shares was determined to be $1,620 per share. Following entry of final judgment, petitioners, as majority stockholders, purchased the dissenting shares on July 16, 1965. During 1963, petitioners paid attorneys', accountants', and appraisers' fees, along with other costs of services rendered in connection with the determination of the value of the dissenter's shares.

The issue here is whether these costs are currently deductible against ordinary income under Section 212 of the 1954 Code as expenses for the production or collection of income, or whether they are nondeductible capital expenditures under Section 263.

The Tax Court held that the costs incident to the value-setting litigation were nondeductible capital expenditures which were to be added to petitioners' cost bases in the acquired stock. (Pet. App. A, pp. A-1-A-9.) On petitioners' appeal, the Eighth Circuit affirmed. (Pet. App. B, pp. A-20-A-33.)

The Seventh Circuit considered the identical question in *Hilton Hotels Corp.* v. *United States*, 410 F. 2d 194, pending on the government's petition for a writ of certiorari, No. 528, this Term. *Hilton Hotels* arises in the context of a statutory merger and in-

volved the costs of a similar appraisal proceeding to fix the value of dissenters' shares. The Seventh Circuit held that such costs were currently deductible as ordinary and necessary business expenses under Section 162. The decision here thus is in direct conflict with that of the Seventh Circuit.[1]

In view of the conflict between the courts of appeals and the administrative importance of the question (see petition for a writ of certiorari in No. 528, p. 16, n. 14), respondent does not object to the granting of this petition.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1969.

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[1] We do not agree, however, with petitioner's assertion (Pet. 10) of a conflict between the instant decision and that of the Ninth Circuit in *Heller* v. *Commissioner*, 147 F. 2d 376, certiorari denied, 325 U.S. 868. As we note in our *Hilton Hotels Corp.* petition (pp. 11-12, n. 11), in our view *Heller* was overruled, *sub silentio*, by the Ninth Circuit's later decision in *Spangler* v. *Commissioner*, 323 F. 2d 913.

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